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Recent Important Decisions

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ATTORNEY AND CLIENT—CONTRACTS RESTRICTING SETTLEMENT BY CLIENT.—A contingent fee agreement made by an attorney with his client provided that the attorney should have a lien for his services on the amount received by reason of the claim, and also that neither party should compromise the claim without the consent of the other. The plaintiff brought suit for the amount of his services against the defendants in the prior suit, who admitted receiving notice of the above agreement. *Held,* an agreement prohibiting a client from settling a case without the attorney's consent is void as against public policy and third parties sought to be held liable for compensation of client's attorney may avail themselves of its invalidity, *Nichols* v *Waters,* (Mich., 1918), 167 N. W. 1.

This question has never been passed on before in Michigan. But the view of the court is in accordance with the weight of authority and reason. Public policy forbids that an attorney at law should so arrange for an interest in the subject matter of litigation as to preclude the client from compromising the cause with the adverse party without the attorney's consent. *Davis* v. *Webber,* 66 Ark. 190. (For collection of authorities, see *Thornton on Attorney at Law,* 754.) The whole contract is affected by the invalidity of a stipulation restricting the client's privilege to settle. *Davis* v. *Webber* (*supra*). Third parties may avail themselves of its invalidity. *Davis* v. *Fid. & Cas. Ins. Co.,* 78 Ohio St., 256; *Ingersoll* v. *Coal Creek Coal Co.,* 117 Tenn. 263. But such stipulation may be held valid. *Lipscomb* v. *Adams,* 193 Mo. 530; *Hoffman* v. *Vallejo,* 45 Cal. 564; *Ft. Worth, etc., Ry. Co. v. Carlock,* 33 Tex. Civ. A. pp. 202. For a discussion of the Missouri case, see 7 MICH. L. REV. 679.

BANKRUPTCY—DISCHARGE—TRANSFER NO BAR TO DISCHARGE.—While the bankrupt was of doubtful solvency and was losing money on a number of stores owned by him, he organized a corporation of which he took all the stock except a few shares held by his wife and his bookkeeper. His profitable stores he transferred to this corporation with the avowed intention of breaking his leases on the unprofitable stores. He hypothecated about three-fourths of the stock to obtain new money from new creditors. *Held* that, in the absence of "fraudulent intent," discharge would not be denied. *In re Braus.* (C. C. A. —, 1917), 248 Fed. 55.

§ 14b (4) of the BANKRUPTCY ACT denies a discharge if the bankrupt has "transferred, removed, destroyed, or concealed * * * * any of his property with intent to hinder, delay, or defraud his creditors." The District Court (237 Fed. 139) recognized a division in the authorities, but *held* with those which presume a fraudulent intent when the necessary effect of the transfer is to hinder, delay, or defraud creditors. See 15 MICH. L. REV. 436. *Dean* v. *Davis,* 242 U. S. 438, although the question there came up under § 67e of the BANKRUPTCY ACT, seems to support the District

Court. § 67e, which makes void as to creditors certain transfers made with intent to hinder, delay, or defraud creditors, was there *held* to apply even in the absence of an actual intent if the "obviously necessary effect" of the transfer was to hinder, delay, or defraud. The Supreme Court, moreover, seems to favor a similar interpretation of the same words as used in § 3 (1) of the BANKRUPTCY ACT, inasmuch as it expressly disapproved of *Githens* v. *Shiffer*, 112 Fed. 505, which had required a specific intent to hinder, delay, or defraud to be shown before a transfer of property could be considered an act of bankruptcy even though the result accomplished was to hinder, delay, or defraud creditors. The stricter construction given to the words in § 14b (4) of the BANKRUPTCY ACT by the instant case can be reconciled with *Dean* v. *Davis supra*, only on account of the somewhat penal character of that section. BLACK, BANKR. § 670; REMINGTON, BANKR. (2nd) § 2467.

BANKRUPTCY—FRAUDULENT TRANSFER OF PROPERTY BARRING DISCHARGE.—Bankrupt formed the defendant corporation with himself, his wife, his infant son, and his attorney, as incorporators, for the admitted purpose of withdrawing his property from the reach of his creditors. By an order of the referee in a summary proceeding, the trustees in bankruptcy were able to seize personalty which the bankrupt had, in pursuance of his plan, placed ostensibly in the possession of the corporation. The creditors of the bankrupt objected to his discharge in bankruptcy on the ground that he had transferred property with intent to defraud creditors. *Held*, that, inasmuch as there was no transfer, a discharge would not be denied. *W. A. Liller Bldg. Co.* v. *Reynolds* (C. C. A. 4th Circ., 1917), 247 Fed. 90.

If the property of a bankrupt is held by a third person without any adverse claim or with merely a colorable claim, the trustee may by summary process reduce it to possession. *Bryan* v. *Bernheimer*, 181 U. S. 188; *Mueller* v. *Nugent*, 184 U. S. 1; Babbitt 1. Dutcher, 216 U. S. 102; *In re Muncie Pulp Co.*, 139 Fed. 546; *In re Franklin Suit & Skirt Co.*, 197 Fed. 591; BRANDENBURG, BANKR. § 1168. A desire to expedite proceedings by means of this summary jurisdiction has perhaps led the courts to regard property which a bankrupt has ostensibly transferred to his wife with the intent to defraud his creditors as still the bankrupt's property. *In re Smith*, 100 Fed. 795; *In re Friedman*, 153 Fed. 939; *In re Eddleman*, 154 Fed. 160; *Shea* v. *Lewis*, 206 Fed. 877; COLLIER, BANKR. (11th ed.), 686, 1075; REMINGTON BANKR. § 1822. And since a corporation formed to defraud creditors is considered a nullity, an attempted transfer of property to it for that purpose leaves the property still in the possession of the bankrupt, so that the trustee may summarily seize it. *In re Berkowitz*, 22 A. B. R. 227, 173 Fed. 1013; *In re Rieger*, &c., 157 Fed. 609. Moreover, the bankrupt must schedule among his assets property thus fraudulently transferred. *In re Welch*, 100 Fed. 65; *In re Pierce*, Fed. Cas. No. 11, 141; *In re O'Bannon*, Fed. Cas. No. 10,394; COLLIER, BANKR. (11th ed.), 262. *Contra, In re Robertson*, Fed. Cas. No. 11,921. These authorities give some excuse for the decision in the principal case. Certainly if there be no "transfer," a dis-

charge in bankruptcy can not be denied merely because of an uneffectuated intent to transfer property fraudulently. BANKRUPTCY ACT, § 14b (4). But to make the test of "transfer" depend on whether or not the property can be recovered by summary proceedings seems erroneous. § 1a (25) of the BANKRUPTCY ACT defines a "transfer" as "the sale and every other and different mode of disposing of, or parting with property or the possession of property, absolutely or conditionally, as a payment, mortgage, gift, or security." *Pirie* v. *Chicago Title Co.*, 182 U. S. 438; COLLIER, BANKR. (11th ed.), 17. The distinction enunciated by the instant case has been ignored by prior cases, where it is said that a discharge will be denied whether or not the property can be recovered by any process. *In re Schenck*, 116 Fed. 554; *In re Nelson*, 179 Fed. 320; *Pirvitz* v. *Pithan*, 194 Fed. 403; *Lewis* v. *Julius*, 212 Fed. 225; *In re DeNomme*, 214 Fed. 671; BLACK, BANKR. § 670; BRANDENBURG, BANKR. § 1497; LOVELAND, BANKR. § 731; REMINGTON, BANKR. § 2553. While this may not be directly in conflict with the rule of the principal case, that can hardly be reconciled with the cases which deny a discharge where the property might have been recovered by summary proceedings even though it is not shown to have been recovered. *In re Heyman*, 104 Fed. 677; *In re Gift*, 130 Fed. 230; *In re Miller*, 135 Fed. 591; *In re Guilbert*, 169 Fed. 149. Nor does the decision seem in harmony with the other sections of the BANKRUPTCY ACT with reference to transferring property with intent to defraud creditors. A bankrupt who transfers property in fraud of creditors does not, under § 1a (15) of the BANKRUPTCY ACT, have the benefit of its valuation in determining his solvency although such property might be recovered by summary proceedings. *In re Hughes*, 183 Fed. 872; *Utah Ass'n of Credit Men* v. *Boyle Furniture Co.*, 39 Utah 518; COLLIER, BANKR. (11th ed.), 13; REMINGTON, BANKR. § 1344. § 67e, which makes void *as to creditors* transfers made with intent to defraud them, seems to imply that the attempted transfer may be considered a transfer for other purposes even if the trustee might attack it in a summary proceeding for the benefit of creditors. When presented with an analogous situation in regard to preferences, the courts have *held* that a nominal transfer of property with intent to defraud creditors or to prefer someone is no less an act of bankruptcy under § 3a (1) or (2) of the BANKRUPTCY ACT because the property might be recovered by summary proceedings. *In re Riggs Restaurant Co.*, 130 Fed. 691; *In re Edelman*, 130 Fed. 700; *Galbraith* v. *Robson-Hilliard Grocery Co.*, 216 Fed. 842; COLLIER, BANKR. (11th ed.), 99, 543, 881, 889.

BANKRUPTCY—WHEN MUST PETITIONING CREDITORS' CLAIMS BE PROVABLE. —In an involuntary petition in bankruptcy, the claims of the petitioning creditors were shown to have been provable at the time of the filing of the petition, but it was uncertain whether they were provable at the time of the alleged acts of bankruptcy. *Held*, on demurrer, that it was sufficient if the claims were provable when the petition was filed. *In re Van Horn, Van Horn* v. *Levison*, (C. C. A., 3rd Circ., 1917), 246 Fed. 822.

Three or more creditors of a person may, with certain limitations, file

a petition to have him adjudged a bankrupt. BANKRUPTCY ACT, § 59b. But must a petitioning creditor have debts provable at the time the act of bankruptcy was committed? Cases based on the earlier statutes, which are somewhat similar, have generally, though not uniformly, answered the question in the affirmative. *De Gols* v. *Ward,* Cas. t. Talb. 243, 1 Bro. P. C. 535; *Toms* v. *Mytton,* 2 Str. 744; *Ex Parte Charles,* 14 East 197, 16 Vesey 256. "Creditor" is defined in § 1a (9) of the BANKRUPTCY ACT as "anyone who owns a demand or claim provable in bankruptcy", but the question remains: "When is it to be provable?" Opponents of the instant case would admit that "taken literally" any of the statutes "would permit a petition to be maintained by a creditor whose debt arose after the commission of the act of bankruptcy complained of", but they would limit this literal interpretation "by the familiar principle, that no one ought to be allowed to complain of that which does not injure him". *In re Muller,* Fed. Cas. No. 9912; *In re Burk,* Fed. Cas. No. 2156. An analogy is drawn between a petition in bankruptcy and a creditor's bill to set aside fraudulent conveyances. *In re Stone,* 206 Fed. 356. The complainant in the case of a fraudulent conveyance must have been a creditor at the time the conveyance was made. *Horbach* v. *Hill,* 112 U. S. 144. A majority of the decided cases agree in applying the same test to petitioning creditors. *Beers* v. *Hanlin,* 99 Fed. 695; *In re Brinckmann,* 103 Fe. 65; *In re Callison,* (Dist. Ct.), 130 Fed. 987, aff'd *sub nom., Brake* v. *Callison,* 129 Fed. 201, 63 C. C. A. 359; BRANDENBURG, BANKR., § 123; COLLIER, BANK., (11th ed.), 843. The alleged analogy breaks down, however, where the acts of bankruptcy have nothing to do with giving preferences or transferring or concealing assets. It is further open to objection because the object by the creditor's bill differs materially from that of a petition in bankruptcy. The creditor's bill is to reward only those who strike down the conveyance while the petitioning creditor in bankruptcy obtains no advantage over any other creditor. It would seem unnecessary, therefore, to complicate matters by departing from a literal interpretation of the statute. *In re Hanyan,* 180 Fed. 498, aff'd without opinion, 181 Fed. 1021; BLACK, BANKR., § 153; LOVELAND, BANKR., § 181; REMINGTON, BANKR., § 214.

BILLS AND NOTES—INTEREST—UNCONDITIONAL PROMISE TO PAY—NEGOTIABILITY—"CERTAIN."—A promissory note contained the following provision: "With interest at 9 per cent per annum, *payable annually* from date until paid: Provided, however, if the note is paid on or before maturity, interest shall only be 7 per cent". *Held,* that it did not contain an unconditional promise to pay a sum certain in money within the provisions of the UNIFORM NEGOTIABLE INSTRUMENTS LAW. *Union Nat. Bank* v. *Mayfield,* (Okl. Sup. Ct., 1918), 169 Pac. 626.

Provisions for the payment of interest after the maturity of a note, where no interest was required before maturity; or for the payment of an increased rate of interest after the maturity of a note, are generally held not to affect the negotiability of the note. *Towne* v. *Rice,* 122 Mass. 67; *De Hass* v. *Roberts,* 59 Fed. 853; *Hollinshead* v. *John Stuart & Co.,* 8 N. D. 35; *Merrill* v. *Hurley,* 6 S. D. 592; *Citizens' Sav. Bank* v. *Landis,* 37 Okl. 530. Several cases

have held that provisions for the payment of interest from date, if not paid at maturity, where no interest was required before maturity or for the payment of an increased rate of interest from date, if not paid at maturity, do not affect the negotiability of a note. *Hope* v. *Barker,* 43 Mo. App. 632 (affirmed in 112 Mo. 338); *Parker* v. *Plymell,* 23 Kan. 402; *Clark* v. *Skeen,* 61 Kan. 526; *Crump* v. *Berdan,* 97 Mich. 293. In *Smith* v. *Crane,* 33 Minn. 144, the provision was precisely similar to that in the instant case, calling for "interest at 10% per annum from date until paid, 7% if paid when due"; and the court held the provision to be the same in effect as if it had reserved the lower rate of interest, with a provision that if the indebtedness was not paid at maturity, interest should run at the higher rate, that the increase, being a penalty, would be invalid and the note would in law draw 7% per annum both before and after maturity, and was negotiable. This decision was not under the UNIFORM NEGOTIABLE INSTRUMENTS LAW, but under the common law. In *Hegeler* v. *Comstock,* 1 S. D. 138, a note providing for the payment of a certain sum "with interest from date until paid at the rate of 10% per annum, 8% if paid when due" was held to be non-negotiable because uncertain as to the rate of interest. This decision was under a code provision defining a negotiable instrument as a written promise for the payment of a certain sum of money, payable without any condition not certain of fulfillment. In *Randolph* v. *Hudson,* 12 Okl. 516, a note containing a promise to pay a certain sum of money "with interest at the rate of 12% from date if not paid at maturity" was held non-negotiable. In *Security Trust & Sav. Bank* v. *Gleichmann,* (Okl. S. C. 1915), 150 Pac. 908, a note, dated May 1, 1905, and providing: "with interest at 8% from Nov. 1, 1905, until paid, interest from date if not paid when due" was held to be negotiable. The court in the instant case expressly overrules *Security Trust & Sav. Bank* v. *Gleichmann, supra;* and upholds *Randolph* v. *Hudson, supra.* While the court in the instant case has undoubtedly arrived at a sound conclusion, it seems to have failed to notice a possible distinction between the principal case and some of the other cases apparently in conflict with it. The provision in the instant case calls for *payment* of interest *annually;* consequently, when such annual payment is made, the note is presumptively discharged *pro tanto,* but, should the note not be paid at maturity, the maker, having paid the lower rate, would owe the difference between that and the higher rate. Therefore, the sum to be paid is uncertain, and cannot be made certain until payment is actually made. In many of the other cases, the notes which provide for payment of a higher rate of interest from date, if not paid at maturity, do not require annual payment of the interest; and, hence, the amount to be paid is certain; either the face value of the note plus the lower rate of interest, or the face value of the note plus the higher rate of interest, depending on whether payment is made at maturity or after maturity.

BILLS AND NOTES — MATERIAL ALTERATION — ENDORSER'S LIABILITY.—Defendant endorsed a promissory note and returned it to the maker with a blank left for the payee's name. The maker inserted a name and later, failing to secure a loan from that party, added the words "or bearer" and dis-

counted it with the plaintiff. *Held,* Watts and Gage JJ. dissenting, that the maker had exhausted his implied authority after inserting one name; that the instrument thereby became complete by relation back to the time of delivery; and that the additional words were a material alteration under the Negotiable Instruments Law, rendering the endorser not liable. *First National Bank of Hartsville* v. *Wood,* (S. C., 1918), 95 S. E. 140.

According to the Negotiable Instruments Law, S. C. Law, 1914, p. 670, the holder has *prima facie* authority to complete an instrument wanting in any material particular, by filling up the blanks therein, but in order to enforce it, once completed, against any party thereto, prior to said completion, it must be filled up strictly in accordance with the authority given. Another section provides that a material alteration, without the assent of all parties liable thereon, avoids the instrument. The dissent in the principal case insists that so long as the maker retained the note he had this implied authority to fill it up sufficiently to negotiate it as both parties intended, and a lapse of time between the two insertions could not affect this authority. When a party puts his own name on a piece of paper to indicate that the instrument is to be a promissory note, or when he signs or endorses it in blank, not filled up, a subsequent payee or endorser may recover, and it is no defense that the deliveree exceeded his authority, *Johnston Harvester Co.* v. *McLean,* 57 Wis. 258. A maker is liable if he intended that his agent should negotiate the note, even if the agent went beyond his authority in filling the blanks. *Ray* v. *Willson,* 45 Can. S. C. 401. There is a distinction between altering a note once filled up, and filling it up if signed in blank. And an instrument is payable to bearer if the only or the last endorsement is in blank, N. I. L. § 9. The addition of the words "or bearer" is not an alteration when they were intended to have been inserted, See DANIEL ON NEGOTIABLE INSTRUMENTS, § 1395, quoting, *inter alios, Kershaw* v. *Cox,* 3 Esp. 246; *Weaver* v. *Bromley,* 65 Mich. 212. In the latter case the material alteration claimed was the insertion of the words "or bearer" and it was *held* that such a change was not a material alteration, and would not avoid the liability of the endorser. Where the effect of such an addition is to impart negotiability to an instrument not intended to be negotiable, the alteration is material and the bill or note avoided. *Haley* v. *Vandiver,* 8 Ga. App. 78, *Winter* v. *Pool,* 100 Ala. 503. In the instant case, however, the defendant's claim, that the alteration destroyed the negotiability of the note, admits that negotiability was originally intended by both parties. In that case the insertion of the payee's name without words of negotiability, could not exhaust the implied authority, since an instrument to be negotiable must be payable to order or bearer, N. I. L. § 1, 4. For this reason it is difficult to see how the doctrine of relation back to delivery, can apply, since the instrument would still fall short of its intended effect, until the second addition.

CARRIERS—FREIGHT RATES—OWNERSHIP NOT BASIS OF RATES.—A carload of broom corn was shipped from Elk City, Ok., to Wichita, Kansas, by S who was both consignor and consignee. On arrival at Wichita, by

virtue of a replevin suit, it developed that S was not owner of all the broom corn. The railroad then claimed the right to charge less-than-carload rates. *Held,* that the carrier has no right to make the ownership of the goods the test by which freight charges were to be determined. *St. Louis & S. F. R. Co.* v. *First Nat. Bank of Elk City et al.,* (Okla. 1918) 171 Pac. 467.

The early decisions are to the effect that the carrier need not give the same carload rate to forwarding companies who collected parcels from many shippers to make a carload with the intention of getting the lower rate, *Lundquist* v. *Grand Trunk Western R. Co.,* 121 Fed. 915; *Johnson* v. *Dominion Ex. Co.,* 28 Ont. 203. See also *D. R. Martin,* 11 Blatch (U. S.) 233 and *Barney* v. *Oyster Bay & H. S. Co.,* 67 N. Y. 301, to the effect that a passenger cannot use the facilities of the carrier to further his own interests. The reasoning of these cases is to the effect that a common carrier does not hold itself out to carry for a competitor. This doctrine was modified in *Buckeye Buggy Co.* v. *Cleveland, C. C. & St. L. Ry.,* 9 I. C. C. Rep. 620 where it was decided that if the consignee is the owner of the goods then he would be entitled to the carload rates although the car load was made up of shipments from various vendors. And, finally, in *Int. Com. Com.* v. *Delaware, L. & W. R. R.,* 220 U. S. 235, the older decisions were overruled, the supreme court holding that the carrier could not discriminate in fixing charges because of ownership of goods tendered for transportation. It was this decision which bound the court in the instant case. And the decision is in accord with the English cases interpreting an act from which the United States act was taken, *Tex. & Pac. Ry.* v. *Int. Com. Com.,* 162 U. S. 197, 222; *Great Western R. Co.* v. *Sutton,* (1869) L. R. 4 H. L. 226. And the rule of *Int. Com. Com.* v. *Delaware, L. & W. R. R.* (*supra*), that railroads cannot discriminate on account of title, has been applied both ways, so that a shipper is bound by a limitation which the forwarding agent may make and must look to the forwarding agent if instructions are not obeyed, *Great N. Ry. Co.* v. *O'Connor,* 232 U. S. 508.

CONSTITUTIONAL LAW — ATTORNEY FEES — EQUAL PROTECTION OF THE LAW.—The revised code of Montana allows an attorney fee of a reasonable amount, as fixed by the court, to the successful plaintiff, who sues a railroad for cattle killed, either on the ground of absolute liability, because of failure to construct or maintain fences or cattle guards, or because of the negligent operation of trains. The plaintiff herein appealed from a judgment in his favor and sought to have reviewed an order of the trial court striking from his cost bill an item of fifty (50) dollars as an attorney fee. *Held,* the above section allowing attorney fees to the successful plaintiff is unconstitutional as denying the equal protection of the laws. *Dewell* v. *Northern Pac. Ry. Co.* (Mont. 1918), 170 Pac. 753.

The court *held* that, since the above provision as to attorney fees applies as well to an action brought for damages for animals killed by the negligent operation of trains as to an action brought for damages arising from a failure to build or maintain fences or cattle guards, it was uncon-

stitutional. The police power of the state extends only to such measures as are reasonable and the general rule is that all police regulations must be reasonable under all circumstances, *Missouri & N. A. R. Co.* v. *State,* 92 Ark. 1. At common law owners were under no duty to fence their lands against the cattle of their neighbors 12 AM. ENG. ENC. OF LAW, 1039. But, owing to the danger to persons and property being transported on the railway from collisions of the train with trespassing animals and danger to the animals themselves, statutes have been passed requiring railroad companies to fence their tracks and to maintain cattle guards at openings. Such statutes are held constitutional, authority for enacting them being found in the general police power of the state to provide against accidents to life and property in any business and employment. *Missouri P. R. Co.* v. *Humes,* 115 U. S. 512; *Minneapolis & St. L. R. Co.* v. *Beckwith,* 129 U. S. 26. In order to enforce the duty to fence, the legislature may prescribe appropriate fines and penalties and what disposition shall be made of the amounts collected are mere matters of legislative discretion. *New Albany & S. R. Co.* v. *Tilton,* 12 Ind. 3. A provision, that an attorney fee may be recovered from a company, which has neglected the statutory duty to fence, by one whose stock has been killed, is held constitutional by the weight of authority though a like fee is not given to the railroad if successful, *Peoria D. & E. R. Co. v. Duggan,* 109 Ill. 537; *Atchison & N. R. Co.* v. *Harper,* 19 Kan. 529. In order then to sustain a statute allowing an attorney's fee to the successful plaintiff the statute must have been a valid exercise of the police power of the state. Clearly the same dangers exist to persons and property being transported on the railway from collisions of the train with trespassing animals once they are on the track whether the track is fenced or not. What the legislature is seeking is the ultimate protection and safety of persons and property from the dangers which naturally result from the swift movement of trains. Requiring tracks to be fenced in is one step toward securing that safety, requiring cattle guards is another and demanding a greater degree of care from trainmen in regard to discovery of cattle that might have strayed upon the track is still another step toward the ultimate object. There certainly is more danger to persons and property from the negligent killing of cattle on a railroad than from the negligent killing of cattle on a highway and there is likewise much more danger that cattle will be killed because of the negligent operation of a railroad than could possibly result from the negligence of persons on a highway. This difference certainly justifies a difference in classification and should be sufficient to sustain such a statute as is found in the principal case as a valid exercise of the police power. But a statute allowing a successful plaintiff to tax an attorney's fee as part of his costs in an action against a railroad company to recover for the killing of cattle has been *held* unconstitutional as a discrimination between litigants. *Wilder* v. *Chicago & W. M. R. Co.,* 70 Mich. 382; *Lafferty* v. *Chicago & W. M. R. Co.,* 71 Mich. 35. In *Gulf C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150 a statute allowing such attorney fees in actions upon certain classes of claims upon railroad companies, was held invalid because it discriminated against one class of debt-

ors, the railroad companies. But the United States Supreme Court in considering a Kansas Statute that allowed a reasonable attorney fee to a successful plaintiff in an action against a railriad company for damages from fire caused by operating the railroad upheld the statute as being in the nature of a police regulation. *Atchison, T. & S. F. R. Co.* v. *Matthews,* 174 U. S. 96.

CONSTITUTIONAL LAW — MECHANICS LIEN STATUTE — ALLOWING ATTORNEY'S FEES.—Where plaintiff in recovering a judgment claimed the benefit of a Florida statute which provides that the plaintiff in a suit to enforce a mechanic's or material-man's lien, if successful, shall recover an attorney's fee, regardless of whether or not he recovers the amount sued for, *held,* such statute is unconstitutional as denying to defendants in such suits the equal protection of the laws. *Union Terminal Co.* v. *Turner Constr. Co.,* (C. C. A., 5th Circ.) 247 Fed. 727.

The United States Supreme Court in *Missouri, K. & T. R. Co.* v. *Cade,* 233 U. S. 642, has recently upheld the provision of a Texas statute for the allowance of a reasonable attorney's fee of not over $20 to the successful plaintiff in a suit in which an attorney is actually employed upon a claim not exceeding $200, against any corporation or person, for various sorts of claims, where the recovery is for the full amount claimed, this statute making no classification of debtors and not appearing to have been made for purpose of bearing against any class of citizens. But a classification of debtors may be made if there is some reasonable basis for the classification. Thus attorney's fees have been allowed against railway companies for damages from fire caused by operating the railroad; the provision being in the nature of a police regulation. *Atchison T. & S. Ry. Co.* v. *Matthews,* 174 U. S. 96. In *Seaboard Air Line Ry. Co.* v. *Seegers,* 207 U. S. 73 an attorney's fee was allowed against a railway for the purpose of securing the prompt payment of small claims on the ground that the matter for adjustment is peculiarly one within the knowledge of the carrier which can determine the amount of the loss more accurately and promptly than anyone else. But the amount recovered must be the amount claimed. *St. Louis; I. M. & S. Ry. Co.* v. *Wynne,* 224 U. S. 354; *Seaboard Air Line R. Co.* v. *Seegers* (*supra*). It has been held to the contrary. *Mobile & Ohio R. Co.* v. *Brandon,* 98 Miss. 461. A state statute allowing attorney's fees against insurance companies which fail to make prompt payment of claims has been upheld. *Pacific Mutual Life Ins. Co.* v. *Carter,* 92 Ark. 378. In several jurisdictions the courts have *held* invalid statutes allowing attorney's fees to successful plaintiffs in suits to foreclose mechanics' liens. *Randolph* v. *Builders & Painters Supply Co.,* 106 Ala. 501; *Mannix* v. *Tryon,* 152 Cal. 31; *Davidson* v. *Jennings,* 27 Colo. 187; *Atkinson* v. *Woodmansee,* 68 Kan. 71; *Brubaker* v. *Bennett,* 19 Utah 401. On the contrary such provisions have been held valid in *Gray* v. *New Mexico P. Stone Co.,* 15 N. M. 478; *Title Guarantee Co.* v. *Wrenn,* 35 Or. 62; and in numerous other jurisdictions. The question has not come up directly before the Supreme Court of the United States, nor has it been passed upon in any other Federal Court. The Court

in the instant case *held* the statute invalid in that it allowed an attorney's fee though the claim asserted is an excessive one and on this ground it seems that such is the proper holding and that the decision is in accordance with the views so far expressed by the United States Supreme Court on the subject. *St. Louis, I. M. & S. Ry. Co.* v. *Wynne* (*supra*); *Seaboard Air Line Co.* v. *Seegers* (*supra*).

CONTRACTS—EXISTING LEGAL OBLIGATION AS CONSIDERATION.—Defendant had leased premises for a term of five years, beginning 1912, at the rate of $134 per month. In 1914 "he found it difficult to pay his rent and was often in arrears." Consequently plaintiff, the lessor, "agreed to 'cut the rent' to $75 per month" and accepted this amount monthly for a year. He then insisted on the original $134 but finally agreed to accept $100 per month. The lease having been terminated, the lessor now sues to recover the difference between the monthly sums of $75 and, later, $100 actually paid, and the stipulated $134. *Held,* plaintiff could not recover. *Brackett & Co.* v. *Lofgren,* Minn. (1918), 167 N. W. 274.

This case involved again the struggle between precedent and practicality in respect to consideration. Doing what one is already legally bound to do is not accepted by courts generally as consideration for a promise. The court, in the principal case, cites "a long line of cases * * * holding that payment by the debtor and receipt by the creditor of a part of a liquidated demand is not a satisfaction of the whole although the creditor agrees to accept it as such." While the courts persistently repeat this rule, they as consistently criticize it and avoid its application wherever possible. See 14 MICH. L. REV. 480; 16 ID. 180, and authorities cited in the principal case. The rule applies to cases in which the obligation is a debt already owing, *Bunge* v. *Koop,* 48 N. Y. 225; *Leeson* v. *Anderson,* 99 Mich. 247; and to those where the obligation is the duty to perform some act, *Foxworthy* v. *Adams,* 136 Ky. 403; *Schriner* v. *Craft,* 166 Ala. 446. But the principal case holds that it does not apply when the new promise itself, as well as the existing obligation, has been performed; that is to say, when the new agreement has been executed on both sides. To utilize this exception the court must have treated the agreement of 1914 as a new contract to lease the property for $75, in substitution for the original lease. There is nothing to indicate that the parties intended more than the simple agreement to accept $75 in lieu of $134 due,—except the desire of the court to avoid the rule. There is exact precedent cited, however. Compare, *Hastings* v. *Lovejoy,* 140 Mass. 261.

CONTRACTS — PROMISE TO CONTINUE SALARY OF EMPLOYEE ENLISTING IN SERVICE.—Defendant District Council issued a circular to teachers in its service stating that "the Authority * * * decided to pay the salaries of those teachers who are serving or who may volunteer for service with H. M. Forces during the war in accordance with the following resolution, namely:—'That all persons in the employ of the Authority who have been or may be called out for active service during the present war be granted

the necessary leave of absence for that period; that payment be made to them or their representatives during their absence from civil duty of their full civil pay, less a deduction on account of Navy or Army pay or allowance * * * *; and that this recommendation shall be deemed to apply to the cases of teachers * * * * who have left or are about to leave for active service.'" On the faith of this circular plaintiff joined the army. Later the defendant rescinded the resolution referred to. In an action to recover arrears of salary, *held* there was a contract between the parties whereby defendant was obligated to make the payments provided for in the resolution. *Davies* v. *Rhondda District Urban Council,* (Ct. of App., 1917), 87 L. J. R. (K. B.) 166.

The very natural question as to whether the resolution was a moving reason for the act of plaintiff, his enlistment, is disposed of by the finding of the court that he did so "on the faith of that resolution." See 12 HARV. L. REV., 515 *et. seq.*: 14 MICH. L. REV. 570, 573 *et seq.; Martin* v. *Meles,* 179 Mass., 114, 117; *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379, 386. In the principal case a further question might be made as to whether the resolution was not a mere declaration of intention to be liberal the carrying out of which was later found to be too onerous or was repented of. The fact that the resolution was in terms applicable not only to those who should enter the service but also to those who had already done so would seem to give some color to such view. Certainly the court reached what would seem to be a just result.

CRIMINAL LAW—"PUBLIC TRIAL" — WHAT CONSTITUTES.—The defendant was on trial for a crime connected with a train robbery. The trial aroused more than ordinary interest. Considerable ill feeling had developed and fights, outside the court room, had been reported to the presiding judge. Near the end of the trial the judge ordered the court cleared of all spectators except relatives of the defendants, members of the bar, and newspaper reporters. The defendant's objection to this excluding order was overruled, but on appeal it was *held* that he had been deprived of his right to a "public trial," a public trial being a trial at which the public is free to attend. *Davis* v. *United States,* 247 Fed. 394.

Similar exclusions have been *held* not to deprive the defendant of his right to a public trial when made to preserve order in the court room, *Stone* v. *People,* 3 Ill. (2 Scam.) 326; *People* v. *Tugwell,* 32 Calif. App. 520. And likewise, similar exclusions, temporarily made for the purpose of alleviating the embarrassment of a witness who was testifying to matter rather disgusting and salacious in its details, did not deprive the defendant of his right to a public trial, *Grimmett* v. *State* 22 Tex. App. 36; *State* v. *Callahan,* 100 Minn. 63. If the spectators at the trial leave on the suggestion from the judge that the evidence about to be given is not fit for a right minded person to hear, but given with a qualification that he has no actual power to exclude them from the court room, the defendant is not deprived of his right to a public trial, *People* v. *Gregory,* 8 Cal. App. 738; *State* v. *McCool,* 34 Kan. 617. And the defendant may waive his right

to a public trial, *Dutton* v. *State,* 123 Md. 373; *State* v. *Keeler,* 52 Mont. 205. There is, however, a direct conflict on the question as to whether the trial judge may make an exclusion similar to the one made in the instant case when the testimony about to be given is scandalous, immoral, indecent, disgusting, obscene, or such as might shock the public morals. Contrary to the doctrine of the instant case similar exclusions have been upheld upon the theory that the defendant's right to a public trial is a right to a trial that is not secret; further, that the defendant must show prejudice when there has been a violation of what they term a "literal right;" and, that there is a discretion resting in the judge to exclude as above when he thinks the testimony will injure public morals, *State* v. *Nyhus,* 19 N. D. 326; *Reagan* v. *United States,* 202 Fed. 488; *State* v. *Johnson,* 26 Idaho 609; *Benedict* v .*People,* 23 Colo. 126; *Robertson* v. *State,* 64 Fla. 437. The authorities in accord with the instant case, while admitting that circumstances may sometimes justify an exclusion order, are to the effect that a public trial is a trial at which the public is free to attend without arbitrary restrictions as to particular classes; and, further, that the defendant need not show prejudice, but that damages will be presumed from the violation of his constitutional right, *State* v. *Osborne,* 54 Ore. 289; *State* v. *Hensley,* 75 Oh. St. 255; *People* v. *Hartman,* 103 Calif. 242; *Tilton* v. *State,* 5 Ga. App. 59; *People* v. *Murray,* 89 Mich. 276; *State* v. *Keeler,* 52 Mont. 205. In *State* v. *Keeler* (*supra*) it was said that the constitutional provision giving the defendant in a criminal case a public trial would be meaningless if the excluding order was upheld, for most of those admitted under the excluding order would of necessity be in attendance upon the trial of every felony case as constituents of the judicial machinery. In *State* v. *Osborne* (*supra*) the court thought that the exclusion of the general public might injure the defendant by giving the jury a bad impression and by depriving him of the right to have his friends present to counteract the bad effect of being accused of a criminal offence.

ELECTIONS—VOTES CAST—INELIGIBILITY OF CANDIDATE RECEIVING LARGEST VOTE.—Plaintiff was a candidate for the office of sheriff at an election of the General Assembly in grand committee. His only opponent had resigned from the Assembly on the day before election, because the State Constitution declared an assemblyman ineligible for the office of sheriff. Such resignation, however, was ineffective as a vacation of the office resigned, no successor having been appointed. A statement of the candidate's ineligibility had been made to the Assembly before election. Plaintiff, who received only 37 out of a total of 116 votes, brings *mandamus* against the Attorney General to compel approval of his bond as sheriff. *Held,* that the votes were not cast in such wilful defiance of law as to be thrown away, and therefore the plaintiff, not having received a majority, had not been elected. *Sanders* v. *Rice,* (R. I., 1918), 102 Atl. 914.

The weight of American authority is with the principal case. The so-called English rule, followed in a few American jurisdictions, is *contra* with certain modifications. In *Rex* v. *Hawkins,* 10 East 211, announce-

ment was made before most of the burgesses had voted, that one candidate had not taken the sacrament within the year. He received the majority but his opponent was declared elected, all votes after the announcement being rejected. *Rex* v. *Parry*, 14 East 549 *held* to like effect, the highest candidate being a minor. Later cases emphasize the necessity for knowledge; *Queen* v. *Tewkesbury Corp.* L. R. 3 Q. B. 628 decided that though the winning candidate was disqualified, because he was also mayor, yet mere knowledge that he held that office, without knowledge of its legal import did not so void his votes as to elect his rival. This is a close approach to the American doctrine as is *Rex* v. *Bridge* I. M. & Sel. 76, where notice of disqualification was not given until half an hour after the polls opened. *Trench* v. *Nolan*, 20 Weekly Reports 833, while deciding for the minority candidate, reaches its conclusion on the express ground that knowledge of open bribery as a ground for disqualification will be presumed. In England, then, if knowledge be brought home to the voters their votes are thrown away, "as if they had voted for the man in the moon," to quote Lord Campbell in *Queen* v. *Coaks*, 3 El. & Bl. 248. The Indiana courts have elected to follow the English rule and refuse to count votes cast for an ineligible, *Copeland* v. *State*, 126 Ind. 51, and *State* v. *Johnson*, 100 Ind. 489. However in *State* v. *Bell*, 169 Ind. 61, the doctrine was rejected in the absence of evidence that the voters had "wilfully and obstinately" cast away their votes. The English rule has been approved also in Kentucky, Louisiana and Maryland, and with qualifications in Missouri and Wisconsin. In *State* v. *Frear*, 144 Wis. 79, the majority candidate died on the eve of the primaries, but since the newspapers published that fact, and a certain faction of the party solicited votes for the dead man, it was *held* that to declare a vacancy would be a fraud on the honest electors, since those voting for the deceased had deliberately waived the privilege of valid franchise by its corrupt exercise. The contrary view was adopted in *State* v. *Walsh*, 7 Mo. App. 142, where the voters with knowledge of A's death voted for him nevertheless and their votes were counted to defeat B, his rival. *People* v. *Clute*, 50 N. Y. 451, expressly approved in *Barnum* v. *Gilman*, 27 Minn. 466, sums up the attitude of the American courts on this question; "the existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector, that to give his vote therewith indicates an intention to waste it. The knowledge must be such, or the notice so brought home, as to imply a wilfulness in acting, when action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both the law and the facts, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied."

ELECTIONS—WHO ARE "ELECTORS"—WOMEN.—After the women had voted in a municipal bond election as authorized by statute, the authorities refused to count such votes toward the required majority but considered only

those cast by the male voters, with the result that the election failed. The vote in favor had to be "a majority of all the electors voting at such election." *Held*, that the vote of the women was merely advisory and was properly excluded in considering the final result, since the statute required a majority of all the electors. The definition of "electors" as set down in the Constitution included males only. *Sears* v. *City of Maquoketa*, (Iowa, 1918), 166 N. W. 700.

Though the decision is unfortunate there seems to be no authority to the contrary. "Electors" has a technical meaning as the opinion indicates: a person possessing the qualifications fixed by the Constitution, and duly admitted to the privileges secured and prescribed in that instrument. The principle is that whenever the Legislature employs the word "electors" without qualification it is assumed to have reference to persons authorized by the Constitution of the State to exercise the elective franchise. *McEvoy* v. *Christensen*, 159 N. W. 179 (Iowa). The trouble usually arises because the Constitution designates the elective franchise in male citizens. But where the Constitution entrusted the creation of school districts to the Legislature the constitutional qualifications did not bar women's votes, since these elections would not involve the election of constitutional officers. *Belles* v. *Burr*, 76 Mich. 1. Where women could vote on questions of policy and administration, a woman who was a registered pharmacist could not obtain a pharmacist's license to retail intoxicating liquors since the statute gave such permission to "qualified electors" only; and this included only males under the Constitution. *In Re Carragher* 149 Iowa 225, Ann. Cas. 1912 C, 972, 31 L. R. A. (N. S.) 321. It has also been *held* that women who could vote did not have to register where the statute required registration of electors. *Wagar* v. *Prindeville*, 21 N. D. 245. Nor were women allowed to vote where the clause in the Constitution read that the officers hereafter to be created "shall be elected by the people" since there was another clause which read that only males could vote "for all officers that now or hereafter may be elective by the people." *In the Matter of Cancellation of Names from the Registry* 5 Misc. (N. Y.), 375. See also *State ex rel. Allison* v. *Blake*, 57 N. J. L. 6, 25 L. R. A. 480. The principal case is a rather novel one in that the women were actually given the vote but owing to the language of the statute it would have to be considered ineffective. The Legislature could have avoided the absurd result reached in this case by using the word "voters" instead of "electors" or by some other more general term. *Olive* v. *School District*, 86 Neb. 135, 27 L. R. A. (N. S.), 523. It would almost seem that the Legislature intended to "make a promise to the ear and break it to the hope." *Hall* v. *City of Madison*, 128 Wis. 132. The holding of the court that the vote was only advisory hardly seems justified since the advice could not be effective until the election would be concluded, when the advice could be to no purpose.

EXTRADITION—PERSONS IN CUSTODY.—Appellant's husband was convicted of a criminal offence in Oregon and sentenced to imprisonment in the state penitentiary. He was released on parol, being forbidden to leave the

state and being required to report by letter at least once a month to the circuit judge. While on parol he was arrested under a warrant issued by the Governor of Oregon, directing his extradition to California to answer to a charge of forgery there pending against him. Appellant instituted *habeas corpus* proceedings to secure the discharge of her husband, basing her claim on a statute which provided that one in custody upon conviction of crime cannot be delivered up until legally discharged therefrom. *Held,* the prisoner could not be extradited. *Carpenter* v. *Lord,* (Ore., 1918), 171 Pac. 577.

The duty of the governor of a state to deliver up a fugitive from justice, charged with crime in another state, and demanded by the executive authority thereof, is imperative. SPEAR, EXTRADITION, 243. If, however, at at the time of the demand for extradition, the accused is held in custody on a criminal charge in the state to which he has fled, he need not be surrendered till the judgment of that state is satisfied. *Taylor* v. *Taintor,* 16 Wall. 366. The cases seem to hold that a prisoner on parol is still in the custody of the state. *Drinkall* v. *Spiegel,* 68 Conn. 441; *Hughes* v. *Pflanz,* 71 C. C. A. 234. But whether the governor of the asylum state may waive the claims of its courts to the control of the fugitive is still an open question. In some cases involving, it is true, the extradition of persons at large on bail, it has been held that the governor has the power to waive the claims of his state in favor of those of a sister state, and the reasoning of the court would seem to be equally applicable to the situation presented in the instant case. *State* v. *Allen,* 2 Humph. (Tenn.) 258; *In re Hess,* 5 Kan. App. 763; *People* v. *Hagan,* 34 Misc. 85. Other courts, conceding the power of the asylum state to waive its rights, have held that it is not a matter for the executive branch of the government. *Hobbs* v. *State,* 32 Tex. Cr. App. 312; *Opinion of the Justices,* 201 Mass. 609. The majority of the court in the present case, in holding the governor bound by a statute declaring the adjudication of a person's legal condition conclusive, have evidently treated the matter as within the province of the legislative department.

FOOD—SALES—LIABILITY TO THIRD PARTIES.—Pork sausage infected with trichinae was sold by the defendant to a retail dealer. The retailer sold it to H., in whose home the plaintiff was employed as a domestic. The plaintiff ate of the sausage and became ill. She sued, claiming that the defendant was guilty of negligence, in that the meat had not been thoroughly inspected. *Held,* for defendant, that while negligence of a manufacturer in the preparation of an article of food is actionable by persons who suffer therefrom, there was no negligence here, since it was not certain that even a number of microscopic tests would have disclosed the fact of the disease. *Ketterer* v. *Armour & Co.* (C. C. A. 2nd Circ. 1917), 247 Fed 921.

Third persons cannot, in general, recover for injuries received because of negligence in the performance of a contract between two other persons, there being no privity of contract on which to base an action. *Winterbottom* v. *Wright,* 10 M. & W. 109; *Lydecker* v. *Board of Chosen Freeholders,* (—N. J.—), 103 Atl. 251. But in certain cases of sales, a remedy

is allowed, not on the basis of contract, but of tort. *Blood Balm Co.* v. *Cooper,* 83 Ga. 457. In these cases it is recognized that a person, in the performance of a contract, may owe a duty of care to outsiders. See *Kerwin* v. *Chippewa Shoe Mfg. Co.,* 163 Wis. 428. *Miller* v. *Steinfeld,* 160 N. Y. S. 800, 15 MICH. L. REV. 181. Exactly what the extent of that duty should be is not universally agreed upon. Whenever the article sold is something other than food, the courts seem apt to be more lenient with the manufacturer than when it is matter intended for human consumption. In *Langridge* v. *Levy,* 2 M. & W. 519, 4 M. & W. 337, the English court *held* the vendor of a gun to the father of the plaintiff liable on the grounds of fraud, for an injury to the plaintiff caused by an explosion of the gun. The vendor had made false representations as to the weapon's make and quality. Negligence was added to fraud in *George* v. *Skivington,* L. R. 5 Ex. 1, where the article sold was hair wash. A Federal court has held a liability would exist where a threshing machine was made so as to be imminently dangerous to human life, if the maker knew of it, and the purchaser was not informed of the danger. *Huset* v. *J. I. Case Threshing Machine Co.,* 120 Fed. 865; commented on in 2 MICH. L. REV. 151. Another Federal court has also held that an automobile manufacturer was not liable to a purchaser from a middleman for injuries received through the breaking of a defective wheel. *Cadillac Motor Car Co.* v. *Johnson,* 221 Fed. 801. In a similar case the New York court held the automobile manufacturer liable. *MacPherson* v. *Buick Motor Co.,* 217 N. Y. 382. And where a needle in a bar of soap ran into plaintiff's hand and paralyzed him, the manufacturer was excused on the grounds that the injury was an extraordinary and unusual consequence which an ordinarily prudent person could not have foreseen. *Hasbrouck* v. *Armour & Co.,* 139 Wis. 357. But when food has caused the damage the courts find for the plaintiff with greater alacrity. But see *Liggett & Myers Tobacco Co.* v. *Camnon,* 132 Tenn. 419, 14 MICH. L. REV. 164, where plaintiff became ill by chewing a bug in a plug of tobacco. The general view appears to be that a high degree of care is due on the part of the manufacturer, but that negligence is the basis of the action. *Brown* v. *Marshall,* 47 Mich. 576; *Tomlinson* v. *Armour & Co.,* 75 N. J. L. 748; *Crigger* v. *Coca Cola Bottling Co.,* 132 Tenn. 545; *Parks* v. *The C. C. Yost Pie Co.,* 93 Kan. 334. That even negligence is not necessary to create the liability is indicated in *Jacksn Coca Cola Bottling Co.* v. *Chapman,* 106 Miss. 864, and it is expressly stated that the duty is absolute in *Catani* v. *Swift & Co.,* 251 Pa. 52. Directly contrary to all these cases is *Nelson* v. *Armour Packing Co.,* 76 Ark. 352, where the court, without mentioning tort, held that since there was no privity of contract between the manufacturer of unhealthy tinned tongue and the consumer who bought from a middleman, there was no liability for injuries the tongue occasioned. This decision, clearly, "is not in touch with the modern drift of authority." *Mazetti* v. *Armour & Co.,* 75 Wash. 622. In the *Mazetti* case, the general doctrine of liability was extended to allow a restaurant keeper to recover for injury to his trade. He had purchased from a retailer, food made by the defendant, and a patron who ate of it became

ill at once, and publicly denounced his restaurant. Public policy, at the basis of our pure food laws, is probably the most potent factor in this liability of food manufacturers. *Mazetti* v. *Armour & Co., supra.* The principal case was before the court, on demurrer, in *Ketterer* v. *Armour & Co.,* 200 Fed. 322. At that time it was held that there would be a liability if the defendant were negligent. The instant decision determines, on the merits, that there was no negligence. *Cf. Race* v. *Krum* (N. Y.), 118 N. E. 853, 16 MICH. L. REV. 555.

INJUNCTION—NEGATIVE COVENANT—"REFUSAL."—S. having composed a book entitled "The Great War," contracted with the complainant for its publication. The contract declared that S. assigned to complainant the work, that the complainant should have the first refusal of any continuation thereof, and that S. should receive payment on a royalty basis. *Held,* that the provision in the contract that complainant should have the refusal of any continuation of the history had to be treated as an option, and could not be construed as amounting to a negative covenant, warranting the issuance of an injunction restraining S. from writing for any other publisher, on the theory that his services were unique and extraordinary. *Kennerley* v. *Simonds,* (D. C., 1918), 247 Fed. 822.

Whether the negative covenant be express or implied in a contract for personal services, equity will never interfere to restrain, by injunction, a violation of such a covenant, unless the services contracted for are especially unique and extrordinary. *Strobridge Lithographing Co.* v. *Crane,* 12 N. Y. Supp. 898; *Hammerstein* v. *Mann,* 122 N. Y. Supp. 276; *Rogers Mfg. Co.* v. *Rogers,* 58 Conn. 356. In the instant case, therefore, when the court, having *assumed* that the contract in question was one for personal services, found that the services contracted for by the parties were not so especially unique and extraordinary as to warrant an interference, by injunction, to restrain a violation of a negative covenant, it could have stopped, without going into the question whether, there being no express negative stipulation, there was an implied one. But the court seems to have gone wrong from the very beginning, since it assumed that the contract in the principal case was a contract for personal services. This was not a contract whereby S. agreed to write certain works and give the complainant the refusal thereof; but this was a contract whereby S. agreed that, *in case* he wrote certain works, the complainant should be given the refusal thereof. Such being the nature of the contract, it clearly was not a contract for personal services, but such a one that, S. having written the works, equity could compel performance by requiring him to offer the complainant the refusal of them. The contract was thus similar to any other option contract to buy or sell (or offer for sale), which type of contract equity will enforce, in spite of the fact that the court, in the instant case, intimates the contrary. *Johnston* v. *Trippe,* 33 Fed. 530; *New Eng. Trust Co.* v. *Abbott,* 162 Mass. 148; WATERMAN ON SPECIFIC PERFORMANCE, sec. 200. In this view of the situation, it appears that the complainant was entitled to the relief he sought, on the ground that he had no adequate remedy at law, for an action for

damages for breach of the contract seems clearly inadequate, there being no possible way of ascertaining the extent to which the complainant has been, and will be, damaged. Lack of an adequate remedy at law is ground for equitable relief. *Adderley* v. *Dixon;* 1 S. & S. 607; *Hicks* v. *Turck,* 72 Mich. 311; *Corbin* v. *Tracy,* 34 Conn. 325; *Watson* v. *Sutherland,* 5 Wall. 74. On this basis, it would seem, therefore, that the complainant was entitled to equitable relief, unless the contract can be said to have imposed too great a restraint on S.'s occupation as a writer, in which case a court of equity will not grant relief. *Jacoby* v. *Whitmore,* 49 L. T. N. S. 335; *Rakestraw* v. *Lanier,* 104 Ga. 188; *Mandeville* v. *Harman,* 42 N. J. Eq. 185; *Turner* v. *Abbott,* 116 Tenn. 718; WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 3rd ed., 362. *Morris* v. *Saxelby,* L. R. (1915) 2 Ch. 57. It is extremely doubtful whether the contract is open to attack on this last ground.

INSURANCE—MARINE—PROXIMATE CAUSE.—Plaintiffs, British merchants, shipped goods on a German ship from Calcutta to Hamburg. The goods were insured with defendants against perils including men of war, enemies, takings at sea, arrests, restraints and detainments of all kings, princes and people. While on the voyage, war was declared and the master put into a neutral port to prevent capture. By English law it became illegal for the plaintiffs to deliver a cargo of jute at Hamburg and by a German edict or order it became illegal for the master to deliver the goods to the plaintiffs. The goods thus became a total loss. *Held,* the proximate cause of the loss is not within the terms of the policy. *Becker Gray & Co.* v. *London Assurance Corporation,* 87 L. J. R. (K. B.) 69.

This case proceeded on the ground that the proximate cause of the loss arose from steps taken by the captain to avoid a peril which had not begun to operate. If a ship be driven by stress of weather on an enemy's coast and there captured, it is a loss by capture and not by perils of the sea. *Green* v. *Elmslie,* 3 R. R. 693. During the Russian and Japanese war a cargo of salt beef was sold in San Francisco because it was anticipated that if the cargo went forward it would be lost by capture. In an action on the insurance policy it was held that the risk of capture had never begun to operate. *Kacianoff* v. *China Traders Ins. Co.* [1914], 3 K. B. 1121. In consequence of the barratrous acts of the master in smuggling, a ship was seized by the Spanish revenue officers. The proximate cause of the loss was held to be, "capture and seizure," and not the barratry of the master so the underwriter was not liable. *Cory* v. *Burr,* 8 A. C. 393. These cases represent the prevailing view in England. There are at least two cases presenting a different view. The captain of a Spanish vessel threw a quantity of dollars overboard to prevent capture by the enemy. This was held to be a loss by enemies and the insurance company was liable. *Butler* v. *Wildman,* 3 B & Ald. 398. In *British and Foreign Marine Ins. Co.* v. *Sanday,* 1 A. C. 650 [1916], British vessels loaded with goods belonging to British merchants were on a voyage from Argentine to Hamburg. The vessels were directed, in one case by a French cruiser and in the other case by the ship owners at the suggestion of the Admiralty, to proceed to British ports, which they

did. It was held that the loss was directly caused by the declaration of war which was a restraint of princes within the meaning of the policies. In *The G. R. Booth,* 171 U. S. 450, it is said, "The question is not what cause was nearest in time or place to the catastrophe. The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is to be charged with the disaster." Where a vessel is lost by an explosion of gunpowder occurring after the ship is on fire, fire is the proximate and sole cause. *Waters* v. *Merchants Ins. Co.,* 11 Peters (U. S.) 213. Where a canal boat was sunk by striking a hidden obstruction and in the delay caused a part of the cargo was frozen, the proximate cause was the sinking of the boat, the freezing of the cargo being a mere incident and the insurer was liable. *Devitt* v. *Providence Washington Ins. Co.* 173 N. Y. 17. The contract of insurance being a unilateral contract and the insured being compelled to accept the form offered in order to secure insurance, it would seem that if the contract was most strongly construed against the insurer a different conclusion might well be reached in the instant case.

INTOXICATING LIQUORS—INSURANCE—LEGALITY OF THE CONTRACT.—A policy of fire insurance was issued covering "a stock of intoxicating liquors, and other merchandise, while contained in a building used for mercantile purposes." Ga. P. C., 1910, provides that it shall be a misdemeanor to sell alcoholic liquor or keep it on hand at one's place of business. *Held,*—Luke J. dissenting, that the contract on its face required the goods insured to be used for an illegal purpose and so the risk never attached. *Wood* v. *First National Fire Ins. Co.,* (Va. 1917), 94 S. E. 622.

Authorities are agreed as to the general rule, if an insurance contract is intended to advance the illegal purpose of the insured the contract is void. However, if such insurance does not further the illegality, altho' it may be collaterally connected therewith, it is not void. *Phenix Ins. Co.* v. *Clay,* 101 Ga. 331. The test as laid down by Judge Marshall in *Armstrong* v. *Toler,* 11 Wheat 258, is that the contract shall be entirely disconnected with the illegal act and founded on a new consideration. Courts have differed on the degree of disconnection required to save the contract of insurance. Some jurisdictions have gone to the extreme of holding valid policies on liquor kept for illegal sale, *Erb* v. *Ins. Co.,* 98 Iowa 606, on the theory that the purpose of the contract is to indemnify against loss, not to encourage illegal acts. Others take a middle ground, namely, that the policy will be invalid unless the liquor is lawfully kept and the wrongful sales are in the nature of a side issue. *Carrigan* v. *Lycoming Ins. Co.,* 53 Vt.. 418. The question has been most often decided in the case of insurance on drug stocks containing liquors in prohibition territory. In a well considered case in Michigan, Judge Campbell distinguished such insurance from marine insurance with which it is sometimes confounded by false analogy. In the latter

case the illegal purpose of the voyage voids the policy *ipso facto* since it calls for an illegal act to be done; whereas with intoxicants it simply protects against accident, and the wrongful use is purely incidental. *Niagara Fire Ins. Co.* v. *De Graff*, 12 Mich. 124, followed in *Ins. Co. of North America* v. *Evans*, 64 Kans. 770 on a similar set of facts. The Massachusetts courts have gone farthest in setting aside insurance on property illegally employed, holding that the insurance risk on a saloon whose owner had no license at the time the policy issued, never attached, *Lawrence* v. *Nat'l Fire Ins. Co.*, 127 Mass. 557; and again ruling against an analogous insurance on a billiard table in an establishment run by joint owners, who both sold liquor, tho' only one had a license, *Johnson* v. *Ins. Co.*, 127 Mass. 555. A series of Missouri cases seem to point the same way but are all explainable by reference to a statute, rendering any contract with regard to intoxicants illegal. The effect of the Mass. decisions is impaired by a later case, *Hinckley* v. *Germania Fire Ins. Co.*, 140 Mass. 38 supporting insurance on a bowling alley whose license had expired before the use was discontinued, which happened before the loss. It is not explained how the risk once detached, (to follow the earlier cases) could again re-attach. No one of the adjudicated cases presents quite the problem of the principal case, because of the incorporation in the policy itself of words capable of the interpretation adopted by the majority opinion, i. e. that to store them in a manner not contrary to the statute would be to contravene an express term of the policy.

JUDGMENT—COLLATERAL ATTACK—DEFECTIVE PETITION.—A petition by a guardian of a freedman for permission to sell his ward's land did not state any reason for sale which the statute of the state made ground for ordering such a sale; but the court in which the petition was filed, the one to which the statute gave jurisdiction over such matters, on hearing ordered the sale, which was made, and the price paid by the purchaser. On suit by the ward against the purchaser to recover possession of the land and quiet the title in him, on the ground that the sale was void by reason of the order being made without jurisdiction: *Held* that jurisdiction was acquired by the petition of the guardian for permission to sell land within the jurisdiction though the petition did not state any cause of action—that objection to such defects could be taken only by demurrer in the original case, not by collateral attack. *Welch* v. *Focht* (Okl., 1918), 171 Pac. 730.

The decision is undoubtedly sound in principle and supported by the decided weight of authority. The opinon of the court contains such cogent argument and extended review of the decisions as to leave nothing to be added. See also 1 MICH. L. REV. 644-657; 10 MICH. L. REV. 384-391.

JUDGMENT—VACATION—UNAUTHORIZED APPEARANCE OF ATTORNEY.—In a suit to set aside a marriage and deprive the alleged widow of an estate, the attorney claimed to represent several plaintiffs, one of whom had not authorized the use of his name, nor ratified otherwise than by failure to have his name removed from the record when he learned the facts. Judgment for

costs was rendered against the plaintiffs and an execution issued. He then began the present suit, in equity, to enjoin the levy. *Held,* that irrespective of the attorney's solvency, the judgment is vacated and the injunction granted. *Anderson* v. *Crawford* (Ga. 1917), 94 S. E. 574.

This effort to review judgment is under statutory authority, Ga. Code 1911, Sec. 5965, and so a direct attack. *Harman* v. *Moore,* 112 Ind. 221. On the effect of such an attack the courts are divided. The older English cases held that the presumption of retainer from the recorded fact of appearance, was conclusive of the court's jurisdiction, and so not subject to direct attack unless the attorney proved to be insolvent, *Latuch* v. *Pasherante,* 1 Salk. 86; *Anonymous,* 1 Salk. 88; *Dundas* v. *Dutens,* 1 Ves. Jr. 196. Some American authorities have chosen to follow this rule. *Denton* v. *Noyes,* 6 Johns (N. Y.) 296, being perhaps the most vigorous early adherent. See also *Carpentier* v. *City of Oakland,* 30 Cal. 439; *Williams* v. *Johnson,* 112 N. C. 424. Another line of authorities, of which the instant case is an exponent, decide that this unauthorized appearance may always be denied in direct attack on the judgment, by intrinsic or extrinsic evidence, *Great Western Mining Co.* v. *Woodmas,* 12 Col. 46; by motion or in equity, *Shelton* v. *Tiffin,* 6 How. (U. S.), 163; unless the party has ratified, *Robb* v. *Vos,* 155 U. S. 13; or has been guilty of undue delay in seeking relief, *Harshey* v. *Blackmarr,* 20 Iowa 161. This would seem to be the better, as well as the majority rule; in fact where the English rule is still adhered to, it is avowedly on the principle of *stare decisis, Vilas* v. *Plattsburgh & M. R. R. Co.,* 123 N. Y. 440, and the courts are astute to find exceptional circumstances to take the case out of the rule. Where the attack is collateral, all cases hold that there is a presumption of authority, *Corbitt* v. *Timmerman,* 95 Mich. 581; thereby presenting a striking analogy to the common law doctrine of the sheriff's return, *Heath* v. *Miller,* 117 Ga. 854. Whether said presumption is rebuttable is still a moot question, with perhaps a growing tendency to allow such rebuttal, FREEMAN ON JUDGMENTS, § 128. Where the judgment is foreign, decisions granting relief are practically unanimous on either direct or collateral attack. *Thompson* v. *Whitman,* 18 Wall. (U. S.), 457.

JURISDICTION—SERVICE OUT OF THE STATE.—In proceedings to adjudge a person insane and appoint a guardian for her person and property a motion to quash on the ground that the only service was made on the supposed insane person out of the state, was overruled. On appeal, *held,* such order was proper, the supposed insane person being a citizen of the state and owing allegiance to it, was bound by its laws as to the method of service, though such service would not be due process of law as to a non-resident. *In re Hendrickson* (S. D. 1918), 167 N. W. 172.

The court relied principally on *Mabee* v. *McDonald,* 107 Tex. 139, in which the same distinction was made between citizens of the state and citizens of the other states, but did not notice that that decision had been reversed by the Supreme Court of the United States (*Mabee* v. *McDonald,* 243 U. S. 90), reviewed in 16 MICH. L. REV. 493. See also 14 MICH. L. REV. 81-82.

LANDLORD AND TENANT — BREACH OF LEASE—DAMAGES—PROFITS.—The plaintiff leased land to the defendants who were to plant it to beans and to share crop with the plaintiff, and upon the defendant's failure to plant in time for a crop the plaintiff brought suit for breach of contract. *Held,* the plaintiff could recover the profits which ordinarily and naturally in the usual course of things would have been derived from the defendant's performance of their contract. *Parkinson* v. *Langdon* (Dis. Ct. of App., Cal., 1918), 171 Pac. 710.

The case raises the question as to what should be the measure of damages for the breach of contract, the subject matter of which is the use or occupation of lands or buildings. Should it be the rental value during the period involved, or the interest for that time on the value of the property, or the profits which ordinarily might have been derived from its use? In a very few instances has the interest on the investment been taken as a measure of damages and then for the reason that it was impossible to find a true rental value. *N. Y., etc., Mining Syndicate* v. *Fraser,* 130 U. S. 611; *Allis* v. *McLean,* 48 Mich. 428. Rental value and not profits would seem to be the usual measure of damages for breach of covenants to lease, or of contracts and covenants with relation to property. *Griffin* v. *Colver,* 16 N. Y. 489; *Wright* v. *Mulvaney,* 78 Wis. 89; *Hodges* v. *Fries,* 34 Fla. 63. Profits may be recovered where they were an element of the contract; if not speculative or uncertain. *Poposkey* v. *Munkwitz,* 68 Wis. 322; *Dennis* v. *Maxfield,* 92 Mass. 138 (10 Allen). The direct fruit of a contract for tenancy on shares is a share of the profits and such profits are recoverable. *Wolf* v. *Studebaker,* 65 Pa. 459; *Hoy* v. *Gronoble,* 34 Pa. 9; *Taylor* v. *Bradley,* 39 N. Y. 129. Certainty being the standard, rental value has been considered by the courts to be the most certain, interest on investment less certain and profits the least certain measure of damages. If it can be said that profits are a certain measure of damages in ordinary cases of tenancy on shares where no specification is made as to the kind of crops which are to be raised; then it is clear that in the principal case profits are a more certain measure of damages, and the proper standard to be employed, since it was agreed between the parties that a certain specified staple crop was to be raised. This fact made it much less difficult to determine the exact damages which resulted from the breach of the contract and made the case a particularly appropriate one for the application of the profit standard.

LANDLORD AND TENANT—FORCIBLE ENTRY—WHAT CONSTITUTES FORCE.—Under a writ of restitution, the defendant came to the dwelling of the plaintiff, his tenant, to throw him out. The writ was void because of irregularities in the trial at which it was obtained. The tenancy had already terminated. Defendant gained admission by a request to look at the water pipes in the building, then, with the assistance of a deputy sheriff, and under the alleged authority of this void writ, removed the plaintiff's belongings. Plaintiff sued under the statute against forcible entries. Defendant claimed that his entry was peaceable. *Held,* for plaintiff, the entry was obtained through

strategy and fraud, and was forcible. *Gallant* v. *Miles,* (Mich. 1918), 166 N. W. 1009.

At common law a landlord could enter, a tenancy having expired, and take possession by force. Statutes soon did away with this privilege. See *Hyatt* v. *Wood,* 4 Johns (N. Y.) 150. There are two fundamental theories as to the purpose underlying these statutes, which lead to diverse definitions of the meaning of forcible and peaceable under them. The first of these theories is that the object of the statute is to prevent riotous and forcible measures in breach of the peace. *Fults* v. *Munro,* 202 N. Y. 34. Under such a view, the statute is interpreted to allow the landlord a broad scope for operations in retaking possession. An entry in the absence of the tenant was thus held peaceable, in *Brooks* v. *Brooks,* 84 N. J. L. 210. And a landlord was allowed to break in through a trap door, forcing boards in it, on the grounds that he had committed a mere trespass, without threats of personal violence, in *Hammond Savings & Trust Co.* v. *Boney,* 61 Ind. App. 295. Where this notion of the reason for the law obtains, the line is generally drawn that, in addition to a mere trespass, such words, circumstances, or actions as have a natural tendency to excite fear or apprehension of danger, are necessary to make an entry forcible. *Butts* v. *Voorhees,* 13 N. J. L. 13. The other underlying theory as to the reason for the statutes against forcible entries is that they are designed to prevent people from taking the law into their own hands. *Mitchell* v. *Davis,* 23 Cal. 381. Under this view, any entry without due legal formality, however quiet, is forcible. *Seals* v. *Williams,* 80 Miss. 234. An entry during the tenant's absence was held forcible. *Wilson* v. *Campbell,* 75 Kan. 159. Michigan seems to have held this second view consistently. In *Seitz* v. *Miles,* 16 Mich. 456, where the situation was very like that of the principal case, an entry under an invalid writ was held forcible. In *McIntyre* v. *Murphy,* 153 Mich. 342, an entry by stealth was held forcible. This case is cited and relied on by the principal case. While the early legislatures probably sought, by forcible entry statutes, to preserve the peace, the tendency today seems to aim in the other direction as well; that an individual has not the right to make himself judge, jury, and hangman in his own cause.

Malicious Prosecution—Civil Action—Absence of Arrest or Seizure. —Defendant in the present suit had, without probable cause, maliciously, and unsuccessfully, caused a civil action to be maintained by third parties against the present plaintiff. There had been, however, no arrest of the person or seizure of the property of the present plaintiff. In the present action it was *held* that the absence thereof was no defence to this suit for malicious prosecution, *Peerson* v. *Ashcraft Cotton Mills* (Ala. 1918), 78 So. 204.

In England the Statute of Marlbridge, 52 Henry III, c. 6, anno 1267, gave the successful defendant his costs, and, if the suit was found to have been instituted maliciously, he was also awarded damages. After this it was necessary, in a suit for malicious prosecution, to allege some special grievance, as arrest of the person or seizure of property, *Savil* v. *Roberts,* 1 Salk.

14; *Smith* v. *Cattel,* 2 Wils. K. B. 376. This doctrine is followed to some extent in the United States, *Potts* v. *Imlay,* 4 N. J. Law *330; *Mayer* v. *Walter,* 64 Pa. St. 283, 289; *Ely* v. *Davis,* 111 N. C. 24. The theory of these cases is that the costs afford full indemnity to the successful defendant, that otherwise litigation might be interminable, and that the plaintiff is given no remedy when the defendant interposes a groundless defence. The contrary doctrine is to the effect that special damages, such as arrest of the person or seizure of the property of the former defendant, need not be shown, *Kolka* v. *Jones,* 6. N. D. 461; *Whipple* v. *Fuller,* 11 Conn. 582; *Eastin* v. *Bank of Stockton,* 66 Calif. 123; *McCardle* v. *McGinley,* 86 Ind. 538; *McCormick Harvesting Machine Co.* v. *Willan,* 63 Neb. 391. This is thought to be the modern tendency, see 16 MICH. LAW REV. 457, and note to *McCormick Harvesting Machine Co.* v. *Willan* (*supra*), 93 Am. St. Rep. 449, 466. The question was before the Alabama court for the first time. In following what they also deemed the modern tendency, the court said that the costs under modern statutes, which differ from the Statute of Marlbridge in that they make no extra allowance for damages in cases maliciously prosecuted, were inadequate and could not compensate for the necessary and reasonable expenses to which the defendant is usually put, nor make good an injury to reputation suffered by reason of the plaintiff's malicious allegations. Further, that experience has shown that litigation has not been interminable as a result of this doctrine. It is always a question of whether the party instituting the previous malicious suit was sufficiently punished by having costs assessed against him when he lost it.

NEGLIGENCE—DUTY TO USE CARE—VOLUNTARY UNDERTAKING.—D invited P to ride gratuitously with him in his automobile and due to D's negligence in crossing a railroad track, though warned by P of an approaching train, the car was struck, P sustaining serious injuries. *Held,* that P could recover therefor. *Avery* v. *Thompson* (Me., 1918), 103 Atl. 4.

The sole question involved in the instant case is the measure of care which an invitor for social purposes owes to his invitee. The conflicting answers which the courts have given to this query are represented by two recently decided cases. This divergence of the authorities finds expression in the diverse solution of the more fundamental problem as to whether or not there are degrees of negligence. The Massachusetts courts, which have uniformly enunciated the doctrine that such do exist, hold the invitor liable only for gross negligence. Thus in *Massaletti* v. *Fitzroy,* 118 N. E. 168, it was held that D was not liable for injuries which P, his invitee, sustained in an accident that was due solely to D's negligence, which was not gross. In accord with this view are *West* v. *Poor,* 196 Mass. 183; *Moffatt* v. *Bateman,* L. R. 3 P. C. 115, semble. But the other view, that of the instant case, seems to be supported by the large majority of the cases. *Pigeon* v. *Lane,* 80 Conn. 37; *Patnode* v. *Foote,* 138 N. Y. Supp. 221; *Beard* v. *Klusmeier,* 158 Ky. 153; *Fitzjarrell* v. *Boyd,* 123 Md. 497; *Siegrist* v. *Arnot,* 10 Mo. App. 197. In the last case Judge Thompson says that "the governing principle here is, that whenever a person undertakes an employment which

requires care and skill, whether he takes it for reward or gratuitously, a failure to exercise the measure of care and skill appropriate to such employment is culpable negligence, and if damages result therefrom an action will lie." Such a doctrine as this indicates that under some circumstances the invitor would be bound to exercise a high degree of care. It means that the invitee can recover for any injuries due to the active negligence of the invitor.

PERPETUITY—LEASE NOT TO COMMENCE WITHIN TWENTY-ONE YEARS—VALIDITY—INTERESSE TERMINI.—The plaintiffs were in possession of a beer house under a lease for fifty years, granted in 1896. The reversioner in fee granted a lease, dated March 25, 1917, of the premises to the plaintiffs, commencing immediately upon the expiration of the first lease. *Held*, the lease is not void as offending the rule against perpetuities. *Mann, Crossman & Paulin Lim* v. *Land Registrar*, 87 L. J. Ch. 81.

The question here is whether the *interesse termini* which undoubtedly the tenant *in futuro* takes is a vested, executory or contingent interest. If it is vested it does not come within the rule of perpetuities. If it is executory or contingent it does. There is no objection on the ground of remoteness to a gift to unborn children for life and then to an ascertained person provided the vesting of the estate in the latter is not postponed too long. *Loring* v. *Blake*, 98 Mass. 253; *Evans* v. *Walker*, 3 Ch. D. 211; *In re Roberts*, 19 Ch. D. 520. The instant case has never been expressly decided by the English Courts. In *Redington* v. *Brown*, 32 Ir. L. R. 347, however, it was decided that such an agreement creates a vested interest. In *Gillard* v. *Cheshire Lines Committee*, 32 W. R. 943, the plaintiff who had agreed to take a theatre for eight weeks to commence at a future time was allowed to maintain an action, for injury to a vested proprietary right, against the defendant who had made excavations and deprived the theatre of the support of the adjacent land. A bequest to an unmarried daughter for life and then to her children for their lives and then to a certain religious corporation vests an absolute estate or interest in the corporation subject to the preceding life estates. *Seaver* v. *Fitzgerald*, 141 Mass. 401. The text books are divided as to the validity of a lease such as the one in question. Speaking generally the older text books regard it as bad and the modern ones as valid. In Preston on Estates, Vol. I., p. 66, it is said that the holder of such an interest has not a vested interest because he has not any seisin or in other words such present right as will enable him to exercise an immediate act of ownership by alienation. An *interesse termini* has always been alienable and executory interests have been made alienable by statute, so the whole reason disappears. A situation closely analogous to the present case is that of a covenant by the lessor for the perpetual renewal of a lease. A covenant for renewal for successive lives to be nominated by lessees does not violate the law against perpetuities. *Pollock* v. *Booth*, 91 R. R. Eq. 229. Such a covenant is an exception to the rule. *Woodall* v. *Clifton* (1905), 2 Ch. 257. In a large number of states of the United States the rule of perpetuities is two lives in being and infancy of the person to take. If a case like the instant

one does not create a vested interest then in states having such a rule a lease to begin tomorrow would be void. Such a doctrine does not seem tenable upon any grounds.

PRINCIPAL AND AGENT—EXECUTION OF CONTRACT—SIGNATURE OF AGENT—INTRODUCTORY HEADINGS.—The terms of the contract sued on were stated in a bought note given by the plaintiffs to the defendants: "To H. N. Morris & Co. * * * Manchester. For and on behalf of:—Messrs. Sayles Bleacheries, Saylesville, Rhode Island, U. S. A. We have this day bought from you 60 tons pure aniline oil, * * f. o. b. Manchester. * * * (Signed) H. O. Brandt & Co." The contract was entered into after war had broken out when every contracting party was required to state the destination of the goods. Defendant claimed that the plaintiffs had no right to bring the suit since the contract was not made to them as buyers, but "to Sayles Bleacheries * * * * as buyers through the plaintiffs as their agents;" that this was the true construction of the phrase "for and on behalf of etc." *Held,* by Viscount Reading, C. J., and Scrutton, L. J., that the plaintiff's action was well brought; that when a man signs a contract in his own name he is *prima facie* a contracting party; that the expression, "for and on behalf of etc.," must be treated as a declaration of the destination of the goods since it was not placed in the body of the contract but in the heading only. Neville, J., dissenting, argued: "The words used here are perfectly plain. It may well be that they serve a double purpose, both to give the required information and to show the character in which one of the parties is contracting. That, however, does not justify me in depriving words of the plain meaning which, to my mind, they undoubtedly bear." *Brandt & Co.* v. *Morris* (C. A., 1918), 87 L. J. R. (K. B.) 101.

There is a general rule that an agent who signs a contract in his own name is personally liable and can sue and be sued in his own name; but if he expresses "by some form of words that the writing is the act of the principal," though done by the hand of the agent, the principal may be bound. *Tucker Mfg. Co.* v. *Fairbanks,* 98 Mass. 101. The question in the principal case was whether there was apparent on the face of the contract any intent to bind the principal. After a very vigorous search the writer has been able to find but one American case directly in point; it supports the conclusion of the principal case and is, indeed, very closely analogous. *General Electric Company* v. *Gill, et al.* 127 Fed. 241 (affirmed in 129 Fed. 349). Evidence of surrounding circumstances was allowed in both cases, then, to construe an ambiguity; there was no direct evidence of intent whatever. If we are to hold with the leading case of *Carpenter* v. *Farnsworth,* 106 Mass. 561, 8 Am. Rep. 360, that the court should always lay "hold of any indication on the face of the paper, however informally expressed, to enable it to carry out the intention of the parties," then it appears that there is a good deal of force to the dissenting view in the principal case. See also *Sun Printing and Publishing Association* v. *Moore,* 183 U. S. 642; *Lutz* v. *Van Heynigen Brokerage Company,* 75 So. 284 (Ala.); *Frambach* v. *Frank,* 33 Colo. 529; MECHEM, THE LAW OF AGENCY (1914), 1135.

PROXIMATE CAUSE—WILLFUL AND NATURAL INTERVENING CAUSES—RAILROADS—INSURANCE.—Owing to the negligence of the defendant in a grade crossing collision, the contents of the plaintiff's wagon were scattered and later stolen. In an action for the loss of the contents of the wagon it was *held*, five judges dissenting, that the finding of the jury, that the collision was the proximate cause of the loss by theft, would stand. *Brower* v. *N. Y. Cent. & H. R. R. Co.* (N. J., 1918), 103 Atl. 166.

While the plaintiff was away for the summer, burglars entered the house, opened certain bureau drawers, took several articles of value, and left various woolen and other garments spread over different parts of the room, so that they were eaten by moths and thus damaged. Plaintiff sought to recover for the damage by the moths on a policy of burglary insurance which insured "for direct loss by burglary." *Held*, six judges dissenting, judgment for the plaintiff should be reversed since the action of the moths was a new and intervening cause; the damage was "indirect and consequential, but not direct." *Downs* v. *New Jersey Fidelity Plate Glass Ins. Co. of Newark*, (N. J., 1918), 103 Atl. 205.

Although the rule of damages in torts is not the same as the rule in the case of contracts yet it should be noted that "what is a cause which creates a liability is to be determined in the same way in actions on policies as in other actions." *Lynn Gas. Co.* v. *Meriden Ins. Co.*, 158 Mass. 570, 576. The rules of legal cause are the same in all actions. "Direct" in policies, then, means nothing more nor less than "proximate." *Western Assurance Co.* v. *Hann* (Ala.), 78 So. 234. The courts have been slow to recognize that there might be an intervening cause without the consequent result of a break in the chain of legal causation; especially has this been so as regards a willful or intentional intervening agency. Thus, where a landlord made repairs and his agents negligently left a partition door open so that thieves were able to steal in and carry away some of the merchandise, it was held that this was not a proximate result of the landlord's negligence. *Andrews & Co.* v. *Kinsel*, 114 Ga. 390. But the present tendency is to follow the dictum of Lord Wensleydale in *Lynch* v. *Knight*, 9 H. L. C. 577, 600, that the test is whether the consequence "might fairly and reasonably have been anticipated." On principle this seems the best view, since any number of instances might arise where intentional acts are foreseeable. Under such circumstances no reason appears why the chain of causation should be here broken any more than in the generally accepted "Squib" case. This principle was strongly sanctioned in *Fottler* v. *Moseley*, 185 Mass. 563. In that case the defendant fraudulently induced the plaintiff not to sell certain stock; an officer of the corporation later embezzled most of the funds thus greatly diminishing the value of the stock, so that the plaintiff had to sell at a great reduction. It was held that the defendant was liable although neither the defendant nor plaintiff had probable ground for foreseeing this embezzlement. Knowlton, C. J., there said: "To create a liability, it never is necessary that a wrongdoer should contemplate the particulars of the injury from his wrongful act, nor the precise way in which the damage will be inflicted. He need not even expect that damage will result at all, if he

does that which is unlawful and which involves a risk of injury. * * The risk of the fall from whatever cause, is presumed to have been contemplated by the defendant when he falsely and fraudulently induced the plaintiff to retain his stock." This principle has long been recognized in insurance cases where it has been held that the company is liable on a fire insurance policy for goods stolen during removal from the premises in an attempt to save them from the fire. *The Independent, Etc., Ins. Co.* v. *Agnew*, 34 Pa. St. 96; *Tilton* v. *The Hamilton Fire Insurance Co.*, 14 How. Pr. (N. Y.) 363; *Newmark* v. *Insurance Co.*, 30 Mo. 160; *Leiber* v. *The Liverpool, Etc., Ins. Co.*, 6 Bush (Ky.) 639. The first of the above cases, then, is supportable on reason and on very respectable authority. There can be no doubt on the facts that the theft was foreseeable since the defendant employed detectives in its usual course of business to guard against theft from its premises. The court, however, went back on itself on the very same day in which the first case was decided. The dissenting opinion in the second case seems the better one. The dissenting opinion, though it cites no cases, has a very strong decision by Judge Story, in an analogous case, to support it. The action was on an insurance policy insuring a vessel against the usual risks. The declaration alleged a total loss by reason of seizure by the Republic of New Grenada and by peril over seas. The defendant showed that after seizure the vessel was allowed to rest in the hot climate where it became rotten through exposure to the action of worms. Story, J., there said: "I take it to be clear, that the whole loss is properly attributable to the capture. It would be an over-refinement and metaphysical subtlety to hold otherwise; and would shake the confidence of the commercial world in the supposed indemnity held out by policies against the common perils." *Magoun* v. *New England Marine Ins. Co.*, 1 Story, 157, 164. An English case is also in point. The insurance on the vessel was from perils of the sea. The ship in question drew a great deal of water during a storm; this wetted certain hides on board from which, as a consequence, a certain effluvium arose which spoiled the flavor of a shipment of tobacco also on board the vessel. It was held that the defendant was liable for the damage to the tobacco. *Montoya* v. *The London Assurance Co.*, 6 Exch. 451. See an excellent article by Judge Jeremiah Smith, "Legal Cause in Actions of Tort." 25 HARV. LAW REV. 103, 118 *et seq.*

RESTRICTIONS—CONSTRUCTION OF—"A SINGLE DWELLING HOUSE"—Plaintiff purchased a lot of ground from defendant, subject to a restriction that but "a single dwelling house" was to be erected on it. Defendant agreed to make like restrictions in conveyances of other property in the district. In these other conveyances he stipulated that duplex dwellings and apartment houses were permissible under the restriction. The plaintiff brought a bill in equity to restrain this as a violation of the covenant with him. *Held*, bill should be dismissed that the covenant is directed against the structure, not its use, and so long as there is a single structure, the restriction is complied with. *Rohrer* v. *Trafford Real Estate Co.* (Pa., 1918), 102 A. 1050.

In the interpretation of restrictions in deeds as to the character of buildings to be erected on the land conveyed, the term "dwelling" is the point at which the lines of authority diverge. Where the words "a single building," or "a single house," are used, there is no difficulty. It is the structure which is defined, and not the use to be made of it. Hence a two family flat was no violation of the restriction providing for not "more than one house to be erected on each forty foot frontage." *Pank* v. *Eaton*, 115 Mo. App. 171. And a house for two residences was allowed where "not more than one building shall be erected on a single lot," were the terms employed. *Fortesque* v. *Carroll*, 76 N. J. Eq. 583. But where the building was put up as two separate homes with a party wall between, it was held that the restriction "not more than one house shall be erected on any lot" was violated, the basis of the decision being that actually two houses had been constructed, though with but one roof. *Ilford Park Estates, Ltd.*, v. *Jacobs*, (1903), 2 Ch. 522. On the other hand, where the restriction was that no dwelling should be constructed "for more than two families," the intent was clear to prohibit a building capable of holding three families. *Ivarson* v. *Mulvey*, 179 Mass. 141. Where the term "dwelling" is involved, there is more confusion. The Michigan court is firm that "a dwelling house" means a building to accommodate but one family, and under such restriction refused to allow a double house with one entrance. *Schadt* v. *Britt*, 173 Mich. 647, 11 MICH. L. REV. 521; *Kingston* v. *Busch*, 176 Mich. 566. Massachusetts has taken a similar view, holding that the restriction "but one dwelling house shall be erected thereon" referred to use by one family, not merely to form of structure. *Powers* v. *Radding*, 225 Mass. 110. Missouri also adopts this view, and refused to allow a double house or an apartment house where not "more than one dwelling" was stipulated for. *Sanders* v. *Dixon*, 114 Mo. App. 229, cited and followed in *Thompson* v. *Langan*, 172 Mo. App. 64. An early and much cited case considering "dwelling" as referring to use rather than structure, is *Gillis* v. *Bailey*, 17 N. H. 18, 21 N. H. 149. The principal case is in line with the decisions that dislike restrictions on otherwise absolute conveyances of property, and limit them as strictly as possible. Illinois has allowed a four story apartment house to be put up on a lot in Chicago restricted to "a single dwelling," *Hutchinson* v. *Ulrich*, 145 Ill. 336. New York intimates a similar sentiment in *Roth* v. *Jung*, 79 N. Y. Supp. 822, in which case, however, the character of the neighborhood had changed. See also, *Reformed P. D. Church* v. *M. A. Bldg. Co.*, 214 N. Y. 268; commented upon in 13 MICH. L. REV. 694. Pennsylvania has precedent for the holding in the principal case. Where "no more than one dwelling house shall be erected or maintained on each forty foot lot," a duplex was allowed. *Hamnett* v. *Born*, 247 Pa. 418. The majority of the courts, however, seem to consider the parties' intentions rather than the population's intensity, and to use dwelling as referring to use, not structure.

TRADE MARKS AND TRADE NAMES—UNFAIR COMPETITION.—Defendant knowingly adopted as a trade mark and name for its syrup a trade mark and name extensively advertised by complainant's predecessor for its flour.

Held, that defendant could be enjoined. *Aunt Jemima Mills Co.* v. *Rigney & Co.* (C. C. A., 1917), 247 Fed. 407.

As "no one desiring to purchase flour would accept syrup without knowing the difference," the District Court (234 Fed. 804) decided that the two articles were in non-competing classes. That this test too narrowly restricted equitable relief was shown by the fact that the publication of a book on banking under the name of a firm of bankers would be enjoined although publishing and banking could not be said to be competing classes. See *British-American Tobacco Co.* v. *British-American Cigar Stores Co.,* 211 Fed. 933. That there may still be articles in non-competing classes is admitted, but they must be so distinctive that the public would not be deceived into thinking that they were made by the same firm. The tendency to deceive the public is selected as the vital factor not primarily to protect the public, but because the ability to deceive puts the first user of the trade name in the power of the second user. The close relation between pancake flour and syrup brings the instant case clearly within the rule as laid down.

WORKMEN'S COMPENSATION—RIGHT OF ALIENS TO COMPENSATION.—P, a non-resident alien, brought suit under the Workmen's Compensation Act to recover for the death of her husbant, who admittedly received fatal injuries in the course of his employment by a subscriber thereunder. *Held,* that P could recover, her alienage being no bar. *In re Derinza* (Mass., 1918), 118 N. E. 942.

In Kentucky, New York, California, Oklahoma, Wisconsin, Michigan, Pennsylvania, West Virginia, and Connecticut the acts contain express provisions allowing non-resident aliens the award of compensation. On the other hand, some states expressly exclude them from the benefit of compensation. See *Gregutis* v. *Waclark Wire Works,* 86 N. J. L. 610. In the jurisdictions where there is no express provision the determination of the question would seem to depend upon the construction of the statutes. In the instant case compensation was granted to such dependents on the principle of contract; it being considered that the act holds out to every workman who accepts employment a promise that in case of his death in such employment his dependents will be compensated. According to this construction, the dependents derive their rights from and through the deceased workman. This is the accepted view so far as there is authority in point. *Krzus* v. *Crow's Nest Pass Coal Co.,* 37 A. C. 590; *Victor Chemical Works* v. *Industrial Board,* 274 Ill. 11, 19-22; *Vujic* v. *Youngstown Sheet and Tube Co.,* 220 Fed. 390, *semble.* To the effect that death statutes are generally construed to enure to alien dependents, see 19 HARV. LAW REV. 215. Certainly one of the original purposes of these Compensation Acts was to relieve the state of the burden of caring for the dependents of the deceased workman. In this view it would seem that aliens abroad, who could not possibly become a burden upon the state, should not be entitled to compensation thereunder. But see *Varesick* v. *The British Columbia Copper Co.,* 12 B. C. 286, *semble; Western Metal Supply Co.* v. *Pillsbury,* 172 Cal. 407, 416 (where the act contained an express provision).